***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 76-1384

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

REV. ALBERTO MEJIAS, MARIO NAVAS, ESTELLA NAVAS, HENRY CIFUENTES-ROJAS, JOSE RAMIREZ-RIVERA, MANUEL FRANCISCO PADILLA MARTINEZ, FRANCISCO CADENA, and ALBA LUZ VALENZUELA,

Defendants-Appellants.

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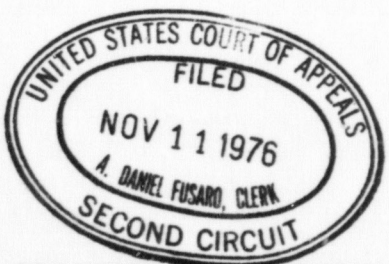
B P/S

Docket No. 76-1384

BRIEF FOR APPELLANT
MANUEL FRANCISCO PADILLA MARTINEZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>-against-<br><br>REV. ALBERTO MEJIAS, MARIO NAVAS, ESTELLA NAVAS, HENRY CIFUENTES-ROJAS, JOSE RAMIREZ-RIVERA, MANUEL FRANCISCO PADILLA MARTINEZ, FRANCISCO CADENA, and ALBA LUZ VALENZUELA,<br><br>Defendants-Appellants. | Docket No. 76-1384 |

# BRIEF FOR APPELLANT
# MANUEL FRANCISCO PADILLA MARTINEZ

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## QUESTIONS PRESENTED

1. Whether the procedure by which the District Judge fixed the sentence of 15 years' imprisonment imposed on 62-year-old appellant Padilla was unlawful, requiring that the sentence be vacated.

2. Whether the warrantless, forcible entry into Apartment 1-B was violative of the Fourth Amendment, requiring suppression of the evidence gained from the subsequent arrests and search of the apartment.

3. Whether the admission into evidence of documents seized from appellant Padilla on February 19, 1976, was error requiring reversal.

4. Whether reversal of appellant Padilla's conviction and dismissal of the indictment are required because the delay in this case violated the Southern District Plan to Achieve Prompt Disposition of Criminal Cases.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter) rendered on July 30, 1976, after a jury trial, convicting appellant Francisco Padilla[1] of conspiracy to distribute cocaine (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846, 952(a), 955, 959, 960(a), 960(b)(1), 963), and sentencing him to a term of imprisonment of fifteen years and three years' special parole. Execution of 534 days of the sentence imposed was suspended to give credit for the pretrial period in state institutions.

This Court granted leave to appeal in forma pauperis and continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

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[1]The indictment (Appellants' Joint Appendix, A.26) lists appellant Padilla's name as Manuel Francisco Padilla Martinez. Throughout the proceedings in the District Court, appellant Padilla was referred to as Francisco Padilla. This procedure will be continued here.

## Statement of Facts

### A. Arrest

On September 3, 1974, as a result of a joint Federal-State investigation (see United States v. Armedo-Sarmiento, Doc. No. 76-1236, slip op. _____ (2d Cir., October 28, 1976)), which had commenced four months previously (H.812-814[2]), appellant Padilla and co-defendants Mejias, Valenzuela, and Salazar were arrested in Mejias' apartment, Apartment 1-B, at 445 West 48th Street.[3] At that time, they were taken into the custody of the State of New York.

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[2]Numerals in parentheses preceded by "H" refer to pages of the transcript of the pretrial hearing. Numerals in parentheses preceded by "T" refer to pages of the trial transcript. Numerals in parentheses preceded by "A" refer to pages of Appellants' Joint Appendix. Numerals in parentheses preceded by "GX" refer to numbers of Government Exhibits in evidence.

[3]At a meeting on May 14, 1974, between Federal and State prosecutors, it was agreed, inter alia, that:

> (a) the New York City Prosecutor would prosecute defendants charged with substantive offenses and any co-conspirators it elected to prosecute;
>
> (b) federal prosecutors would prosecute co-conspirators not prosecuted by the New York City Prosecutor;
>
> (c) the timing of any arrest was to be cleared first with the New York City Prosecutor.
>
> Affidavit of Assistant United States Attorney Littlefield, Record on Appeal, Document #33 (A.156).

On September 19, 1974, a formal agreement between the federal prosecutor and state prosecutor was made, designating those individuals to be prosecuted by the State of New York and those to be prosecuted by the Federal Government. It was agreed that the four individuals arrested in Apartment 1-B were to be prosecuted by officials of the State of New York. Record on Appeal, Documents #32, #33 (A.153, 156).

Six days after the arrests, an indictment was filed charging appellant Padilla's violation of New York State narcotics laws. This first indictment was subsequently superseded by an indictment filed on May 2, 1975, and an additional indictment filed on August 1, 1975, charging, inter alia, appellant's participation in a conspiracy to violate State narcotics laws.

After an extensive hearing in State court, all the evidence seized both at the time of appellant Padilla's arrest and as a result of the subsequent search of Apartment 1-B was suppressed on the ground that the prosecutor had not established the exigent circumstances necessary to justify a forcible, warrantless entry into the apartment. People v. Salazar, 83 Misc.2d 922, 373 N.Y.S.2d 295 (Sup. Ct. N.Y. Co. 1975).

B. Indictment

On February 10, 1976, an indictment was filed by the grand jury in the Southern District of New York charging appellant Padilla and nine others with conspiracy to import, possess, and distribute cocaine.[4] Ten days later, appellant Padilla, who had been incarcerated in State custody from the time of his arrest, was arraigned on this federal charge.

C. Pretrial Proceedings

1. Speedy trial motion

By notice of motion dated March 24, 1976, appellant Padilla moved to dismiss the indictment on the ground that the Government had violated the then-applicable Southern District Plan for the Prompt Disposition of Criminal Cases (the "Plan") promulgated pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure. Record on Appeal, Document #13. Appellant Padilla argued in his motion that his confinement without trial for the 19 months since his arrest violated Rule 4 of the Plan, which required the Government to be ready for trial within six months of arrest. Record on Appeal, Document #12. On May 4, 1976, approximately one

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[4]The indictment also listed 33 "unindicted" co-conspirators.

and one-half months after the filing of this motion to dismiss, the Government filed its notice of readiness (Record on Appeal, Document #4).

In an opinion dated June 21, 1976, the District Court denied the motion, holding that appellant Padilla's speedy trial rights under the Plan did not commence until his arraignment on the federal charge (A109 ) and that therefore any delay did not violate Rule 4.

2. Motion to suppress

Appellant Padilla also sought suppression of all the physical evidence and the statements obtained as a result of the warrantless, forcible entry into Apartment 1-B at 445 West 48th Street, the arrest of appellant Padilla there, and the subsequent search of that apartment (Record on Appeal, Document #27). A hearing was held on the issue.

At the hearing, Drug Enforcement Administration Agent Forget testified that on September 3, 1974, he, with DEA Agent Williams, New York City Police Officer Palazzotto, and New Jersey State Trooper Bucci, was on duty near 445 West 48th Street (H.65). Agent Forget stated that at approximately 4:45 p.m., he saw co-defendant Mejias and two other persons leave a taxi and enter that building (H.65-66). At that time, the four law enforcement officers also entered the building. Agents Forget and Williams and Officer Palazzotto went to the roof, where they met the superintendent of the building (H.71).

There, Agent Forget and Officer Palazzotto asked the superintendent about the construction of the apartments on the first floor and their exits and entrances. The superintendent explained the plan of the two apartments and the possible means of exit (H.72, 139-140).

After this conversation, Agent Williams remained on the roof to insure that no one would leave Apartment 1-B without being detected (H.73, 404-405). Agent Forget, Officer Palazzotto, and the superintendent then returned to the lobby (H.73). The superintendent then left the lobby. While Trooper Bucci rang the outside buzzer to Apartment 1-B (H.155-156), Officer Palazzotto and Agent Forget stood in front of the doorway to the apartment with their shields observable and their guns drawn (H.74-76). After a short time, Officer Palazzotto knocked on the door. A hooked chain held the door, and co-defendant Mejias was able to open it only partially. Officer Palazzotto stated that he was a police officer, and told co-defendant Mejias that Mejias was under arrest. Instead of coming out of the apartment as the officer expected (H.558), Mejias backed out of sight. Undaunted, Agent Forget and Officer Palazzotto forcibly broke through the door and the chain (H.77-78, 158-159, 199, 407, 511).[5] Officer Palazzotto then grabbed co-defendant Mejias, who was a few feet from the doorway, and placed him against a wall (H.78, 161). Agent

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[5]The testimony indicates that Agent Forget and Officer Palazzotto broke into Apartment 1-B at 5:10 p.m. (H.174).

Forget testified that he saw three other persons in the apartment near a bed (H.79, 162). On the bed were five piles of United States currency, some loose money, a piece of cardboard, a brown paper bag, and a red plastic shopping bag with white handles (H.79, 169). All four persons were arrested (H.414), placed against a wall, and frisked (H.80, 165). Agent Forget testified that the apartment was secured (H.487) and the arrested persons detained there until a search warrant was obtained and brought to the apartment (H.174).

Officer Palazzotto confirmed most of Agent Forget's testimony, and gave other critical evidence. Palazzotto explained that at 2:20 p.m. on September 3, 1974, while he was outside 445 West 48th Street, his superiors told him he could arrest Mejias "any time he saw fit" (H.398, 531). In accordance with these instructions, at 3:00 p.m. Officer Palazzotto had decided to arrest Mejias. Thus, this decision was made prior to the arrival of the three people in the taxicab (H.542, 737).

The officer stated that after breaking into the apartment he saw Mejias facing him, backing away from the door. On the bed nearby, Officer Palazzotto saw appellant Padilla and co-defendants Salazar and Valenzuela. Palazzotto testified that appellant Padilla and co-defendant Salazar had money in their hands and were about to stand up (H.407-408, 745).[6]

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[6]Officer Palazzotto also testified about the existence of probable cause to arrest Mejias and Padilla. This testimony consisted of a summary of that portion of the joint Federal-

In support of the motion to suppress, appellant Padilla argued that a warrant was required to justify the forcible entry into Apartment 1-B, since exigent circumstances for the arrest did not exist (H.925, 927). In opposing the motion, the Government specifically disavowed reliance on the presence of exigent circumstances; rather, the Assistant U.S. Attorney contended that there was probable cause to arrest co-defendant Mejias and that, by announcing his authority and purpose, Officer Palazzotto complied with the requirements of the law (H.945-947).

In an opinion dated June 11, 1976,[7] Judge Carter denied the motion to suppress. The District Judge recognized that "the legality of a warrantless arrest inside an apartment has not been completely resolved...." However, although he found no evidence of imminent flight nor proof that Mejias was armed,

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[Footnote continued from the preceding page]

State investigation with which Palazzotto was familiar. The officer testified that he read various police reports and synopses of wiretaps and had participated in surveillance activities (H.309-318, 337-393, 481-483, 549, 645, 718-722). Further, Officer Palazzotto testified that during the course of the arrest, he read various notations written on a piece of cardboard that was on the bed (H.477, 754-757). He associated these notations with narcotics activities (H.478-480, 757). Moreover, Palazzotto indicated that prior to the arrest there was no information whatsoever indicating appellant Padilla's participation in any activities involving narcotics (H.760). Appellant Padilla does not challenge the District Court's finding that there was probable cause to arrest (A.145).

[7] The June 11 opinion denying the motion to suppress may be found at A.134.

Judge Carter held that the forcible entry into the apartment was justified by "all the circumstances" (A.144).

## D. The Trial

### 1. Proof of the conspiracy

Proof of the conspiracy consisted of wiretaps, recorded conversations, photographs, observation surveillances, and evidence seized from the defendants incident to their arrests. In addition, physical evidence, obtained as a result of the search of a number of apartments in Queens and Manhattan and of a bank safety deposit box, was admitted as proof of the conspiracy charged (see T.274, 277, 281, 284, 289-291, 302, 305, 311, 315, 333, 358, 361, 369, 436-440, 497-498, 526-529, 539, 573, 587, 634, 719, 728-738, 655-656, 677, 816, 857-864, 886, 896, 934, 940-949, 954, 990, 997-1001, 1005, 1045, 1069, 1085, 1092-1101, 1122-1125, 1138, 1144, 1157, 1159, 1165, 1171, 1197, 1199, 1208, 1266, 1298-1305, 1311, 1324, 1394, 1402-1405, 1413, 1423, 1440, 1470, 1483-1490, 1518, 1529-1532, 1580, 1598, 1610, 1613, 1640, 1810, 1850, 1859, 1870, 1885-1887, 1902, 1905, 2000-2001, 2015, 2047, 2058, 2099, 2104, 2192, 2203, 2209, 2212, 2216, 2220, 2405, 2656, 2794, 2964, 3001, 3146, 3181). The Government's proof involved a wide-ranging conspiracy to import and distribute cocaine in New York City.

2. Proof relevant to appellant Padilla's participation in the conspiracy

Proof that appellant Padilla participated in the conspiracy included Officer Palazzotto's testimony about the circumstances of the arrest (T.2894-2908, 3071). Two slips of paper (GX 103-B, GX 103-D), which Palazzotto connected to narcotics activities (T.3053), and an address book (GX 103-A), containing names of several co-conspirators (T.3034-3036, 3040-3041) were also admitted into evidence (T.2910, 3034, 3053). These documents were seized from appellant Padilla during his arrest.[8]

In addition, Oscar Perez, the owner of the Las Americas shipping firm, testified on behalf of the Government. He testified that on December 16, 1973, he met with Clavelia del Rosal de Arana, Carlos Julio, co-defendant Mejias, and appellant Padilla in the offices of Las Americas (T.1654) and that they asked Perez to ship a car and personal effects to Colombia, South America, which Perez did later in December (T.1655, 1660, 1662, 1668, 1675).

New York City Police Officer Rowan testified that on August 30, 1974, at approximately 9:45 a.m., on 48th Street and

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[8]During the course of the arrest in the Mejias apartment, Officer Palazzotto took from the bed a red plastic bag containing money. He testified that co-defendant Salazar asked the officer what Palazzotto was going to do with the money. Salazar explained that appellant Padilla had lent him $20,000. Officer Palazzotto stated that appellant Padilla confirmed the loan arrangement (T.2905).

Tenth Avenue, he saw appellant Padilla, co-conspirator Armedo-Sarmiento, and an unidentified person in a car driven by co-defendant Mario Rodriguez (T.2799-2801). The car stopped, and the occupants got out. Co-conspirator Sarmiento made several telephone calls. After a few minutes, co-defendant Mejias arrived. After a brief conversation with Mejias, the four persons returned to the car and drove to the Skyway Lounge on Tenth Avenue (T.2801, 2803-2804, 2814). A short time later co-defendant Mejias, carrying a brown paper bag, entered the lounge (T.2804). Later that same day, appellant Padilla and co-defendant Mejias left the lounge together, with Mejias still carrying the brown paper bag (T.2805).

DEA Agent Palombo testified that on August 31 or September 1, 1974, he saw appellant Padilla and co-defendant Mejias go into an apartment building on 48th Street between Ninth and Tenth Avenues, and that appellant Padilla, carrying a brown attache case, left the building twenty minutes later and walked to the Skyline Motor Inn. At the hotel, Padilla went to Room 327 (T.2128-2131).

On September 3, 1974, New York City Police Officer Connelly went to that room and found a brown attache case containing $31,500 (T.2995, 2997-2998; GX 560).

As documentary proof of appellant Padilla's participation in the conspiracy, the Government offered in evidence several items which were seized from appellant Padilla when he was taken into federal custody in February, 1976. These documents

consisted of a temporary receipt for payment of a room at the Skyline Motor Inn, dated September 2, 1974 (GX 104-A), a business card from the Las Americas firm (GX 104-B), and an invoice from the L & L Luggage Company listing appellant Padilla's name and reflecting the purchase of a bag (GX 104-F). On the reverse of the Las Americas business card (GX 104-B) were the names of appellant Padilla and Jose Reyes, with typewritten notations indicating an itinerary from New York to Curacao and Baranquilla, Colombia. Appellant Padilla objected to the admission of these exhibits as hearsay (T.3398, 3400, 3411). Further, trial counsel explained that the luggage and the receipts were not admissible, since the Government had failed to lay a proper foundation to show that these documents were business records (T.3389-3390, 3392-3394).

In response, the Assistant United States Attorney argued that the jurors could properly infer from the luggage receipt that appellant Padilla purchased the brown attache case he carried into the Skyline Motor Inn, and that the attache case and the money in it were his (T.3396). Moreover, the Government argued that the notations on the back of the Las Americas card showed that appellant Padilla had, in fact, travelled to Colombia (T.3397), while the hotel receipt indicated that he occupied Room 327 at the Skyline Motor Inn at a critical time during the existence of the conspiracy (T.3397).

Judge Carter overruled appellant Padilla's objection, holding that the documents were admissible since they were

validly seized from appellant Padilla (T.3411-3412).[9]

During summation, the Assistant United States Attorney argued that, as part of the conspiracy, appellant Padilla travelled to Colombia on April 27, 1974. The prosecutor contended that the information on the reverse of the Los Americas business card (GX 104-B) was proof of this trip,[10] and that the jurors could properly infer that Mr. Perez had made the necessary travel arrangements (T.3633). Moreover, the Assistant United States Attorney argued that the temporary hotel receipt seized from appellant Padilla, showed that Padilla had stayed in Room 327 of the Skyline Motor Inn with co-defendant Salazar, and that the luggage receipt (GX 104-F) proved appellant Padilla's purchase of the attache case carried into the hotel room (T.3730-3731). In the jurors' presence, the following colloquy occurred:

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[9]Judge Carter stated: "I think that they [the documents] were on him is sufficient to get it in in terms of the fact they got them off of him" (T.3412). In addition to these documents, appellant Padilla's bank records were entered in evidence (T.2557-2563). These records showed two deposits. The first, dated March 15, 1974, was for $50,000. It is undisputed that this amount was the proceeds from winning the New York State Lottery (T.2563-2565). The second deposit was made on September 3, 1974.

[10]GX 104-B listed appellant Padilla's name, the initials "O.W.," the notation "April 27/74, Lev. 2:25 Arr Cur. 6:45 P.M.," the price of the round-trip and one-way air fares, and flight number "KL 9960." In addition, there were the following handwritten notes:

| RT | |
|---|---|
| JFK-CUR-BAR-JFK | JFK-CUR-BAR |
| CUR-BAR OPEN | CUR-BAR OPEN |
| BAR-JFK OPEN | O.W. |

The Assistant U.S. Attorney argued that O/W meant one way (T.3633).

> THE COURT: I think that those documents were admitted in evidence and were admitted only for the purpose of showing that they were in his [appellant Padilla's] possession at the time of his arrest and you may ask the jury to conjecture, but they were not admitted for the purpose that you indicated, Mr. Carey.
>
> MR. CAREY [the Assistant U.S. Attorney]: I don't understand.
>
> THE COURT: They are only admitted to show that he had them in his possession at the time.
>
> MR. CAREY: I don't understand the relevance of that. That is not why they were offered, Your Honor.
>
> THE COURT: That is why I made that clear to the jury.
>
> (T.3731).

On rebuttal, the Assistant United States Attorney repeated the argument that the Las Americas business card was proof of a one-way trip by appellant Padilla to Colombia (T.3997), and again asserted that the hotel and luggage receipts corroborated the Government's proof of appellant Padilla's particpation in the conspiracy (T.3998-4000, 4021).

After approximately two days of deliberations, the jury convicted appellant Padilla as charged.

## E. The Sentence

The Assistant United States Attorney actively participated in the sentencing procedure. He told the District Judge that some considerations were not covered by the presentence report.

These circumstances indicated that the extent of the criminal activity of all the defendants "was far broader than that which was revealed during the course of this lengthy trial" (T.4158) and that "the people in this particular case ... represent the highest level of this particular organization which is known to my office and to the investigators who worked on this case" (T.4159).

Further, he argued, the wiretaps showed the extensive nature of this conspiracy (T.4160),[11] that all the defendants were in the United States with no showing of any legitimate means of support (T.4162), and that the District Court should impose severe prison sentences, not deportation, as a lesson to all illegal aliens not to travel to the United States and commit crimes (T.4163-4165). In addition, the Assistant U.S. Attorney indicated to Judge Carter that the defendants in this case failed to cooperate with the Government (T.4164) and that all Colombians who are charged with narcotics violations do not cooperate (T.4165). He continued:

> The only way in which the courts, and they are a lax line of defense against further criminal activities of this nature, can have an effect to prevent this occurrence is to give sentences in a case like this which will serve to make these defendants ... as well as others who might follow them, to think twice about the price they have to pay on the remote chance they should be caught in the United States.
>
> (T.4166).

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[11] It was undisputed that there were no wiretaps involving appellant Padilla.

Appellant Padilla's trial counsel disputed the Assistant United States Attorney's blanket characterization of all the defendants, stating that appellant Padilla's background was unique and that "it is especially important in dealing with this defendant to take him as an individual and take into account his past history" (T.4202). Trial counsel explained that appellant Padilla was 62 years old, that he was a legal alien and a permanent resident of the United States, that he had never before been arrested, and that this was his first conflict with the law. Trial counsel told Judge Carter that, as the presentence report reflected, appellant Padilla had been working gainfully for ten years in this county, supporting his family. Moreover, appellant Padilla's employers confirmed that he was a dedicated, reliable, and hardworking individual (T.4202-4206). The Assistant U.S. Attorney did not dispute these facts, but rather argued that they were irrelevant to the sentencing process (T.4207).

After counsel for each defendant had spoken, and prior to imposition of sentence, Judge Carter stated:

> Let me make clear that the sentence I am going to give will probably be the most severe that I have ever given in my career, and I am going to do that and I don't want to sound like a jingoist, but I am doing it because I think that people who come and deal in drugs and traffic and make profit on it from foreign countries coming into this country, that that is something that as a Judge, when I have the opportunity to, I cannot tolerate. You have been found guilty and I am going to sentence

you to the maximum penalty under the law. Well, not exactly the maximum....

(T.4216-4217).

Thus, on Count One, Judge Carter sentenced each defendant to a term of imprisonment of fifteen years. Execution of that portion of pretrial time spent in New York State custody was suspended.[12] Appellant Padilla was sentenced in conformity with this announced policy.

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[12] Judge Carter did not suspend execution of that portion of pretrial time already served in state custody by co-defendant Carlos Julio.

## ARGUMENT

### Point I

THE PROCEDURE BY WHICH THE DISTRICT JUDGE FIXED THE SENTENCE OF 15 YEARS' IMPRISONMENT IMPOSED UPON 62-YEAR-OLD PADILLA WAS UNLAWFUL, AND THE SENTENCE MUST BE VACATED.

Adopting an approach often taken by the Government and by courts in narcotics conspiracy cases, at sentencing in this case, the Government's position was that all seven convicted defendants should be treated identically with one another. The Assistant United States Attorney argued that all seven were high level narcotics dealers who had illegally entered the United States, without means of support, for the specific purpose of distributing narcotics and committing other crimes. Judge Carter accepted the Government's position when he imposed 15-year terms of imprisonment on all the defendants:

> I am doing it because I think people who come and deal in drugs and traffic and make profit on it from foreign countries coming into this country, that that is something as a Judge, when I have the opportunity to, I cannot tolerate.
>
> (T.4216).

Judge Carter's decision was made in disregard of critical, but obviously unheeded statements by defense counsel advising the judge that the Government was incorrect in equating Padilla's background with that of the other defendants. Unlike the other defendants, Padilla had legally entered the United

States ten years earlier, after honorably serving in the Colombian Army and Customs Service. Padilla became a legal permanent resident of the United States. Throughout the period of his residence here, he had an unblemished record, living with his family in Brooklyn. He had been gainfully and continuously employed in New York City, having worked for Irving Tershal, Inc. for two years and for Shuster Express for 8 1/2. The presentence report confirmed these facts, and in response to inquiry by the Probation Department, Padilla's two employers considered him hardworking, dedicated, and reliable.[13] Thus, Mr. Tershal described appellant Padilla as "a most dedicated and reliable worker," while Richard Mirsky of Shuster Express considered him a "good worker." Both indicated that they would not hesitate to employ appellant Padilla again.

In the face of this great disparity in background between appellant Padilla and the other defendants, Judge Carter's articulated acceptance of the Government's position that all the defendants were alike and his similar treatment of all of them, reflected a mechanical exercise of the judge's sentencing authority, without regard to the individual defendant's background and characteristics. It is no longer subject to

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[13] We request that the presentence report be examined by this Court.

dispute that such a mechanical treatment of a defendant is rejected in favor of the individualized approach to sentencing. Williams v. New York, 337 U.S. 241 (1949); United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974); United States v. Baker, 487 F.2d 360, 361-363 (2d Cir. 1973); United States v. Hartford, 489 F.2d 652, 654 (5th Cir. 1974); Woosley v. United States, 468 F.2d 139, 144 (8th Cir. 1973); United States v. Daniels, 446 F.2d 967, 970 (6th Cir. 1971).

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.... Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders.
>
> Williams v. New York, supra, 337 U.S. at 247-248.

Judge Carter's statement in this case may not have reflected the usually condemned broad, fixed standard applied by a judge to all defendants who commit a particular crime, but rather a specific variation of this invalid sentencing procedure which results in the very evils recognized by the more generalized one. It ignores the unique qualities of background and character that are part of the particular defendant.

In addition to demonstrating the mechanical approach to sentencing, Judge Carter's statement reflects that he assumed that the general information given to him about all the defendants was accurate as it related to Padilla. As noted, such an assumption was incorrect. Appellant Padilla did not

enter the country to commit crimes; he was not without other means of support; he had no prior record; and there is no indication he had any prior connection with narcotics. Thus, the sentencing process was invalid because it was premised on assumptions as to critical facts which were incorrect. Townsend v. Burke, 334 U.S. 736, 740-741 (1948); see United States v. Robin, Doc. No. 76-1033, slip op. 5829, 5834-5835 (2d Cir., October 15, 1976); United States v. Needles, 472 F.2d 652, 657 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970).

The 15-year term of imprisonment that Judge Carter imposed on appellant Padilla, who is 62 years old, is tantamount to a life sentence. The imposition of this sentence in light of the facts of this case and appellant Padilla's unique background is so severe as to constitute cruel and unusual punishment. In view of the defective procedures used to impose it, the sentence should not be allowed to stand. See United States v. Stein, Doc. No. 76-1299, slip op. 211, 227 (2d Cir., October 22, 1976) (Lumbard, J., concurring); Hart v. Coiner, 483 F.2d 136 (4th Cir.), cert. denied, 415 U.S. 938 (1973).

Thus, appellant Padilla's sentence must be vacated and a remand ordered for re-sentence before a different judge. See United States v. Robin, supra, slip op. at 5841, and the cases cited therein; see also United States v. Stein, supra, slip op. at 227.

## Point II

THE WARRANTLESS, FORCIBLE ENTRY INTO APARTMENT 1-B WAS VIOLATIVE OF THE FOURTH AMENDMENT, AND REQUIRES SUPPRESSION OF THE EVIDENCE GAINED FROM THE SUBSEQUENT ARRESTS AND SEARCH OF THE APARTMENT.

As the result of an ongoing investigation that had lasted more than seven months, Officer Palazzotto believed that there was probable cause to arrest co-defendant Mejias for violation of the drug laws. However, he did not seek judicial authorization for the arrest based on the information that led to this belief, but rather decided to effect Mejias' arrest without a warrant in Mejias' apartment. Thus, with his intention clear, Palazzotto, with federal DEA Agent Forget, their guns drawn, knocked on the apartment door of Mejias' residence. Rather than coming out of the apartment as the officers had expected, Mejias partially opened the door, which remained secured by a chain. Undaunted, the officers broke through the door and chain, arresting Mejias, appellant Padilla, and the other occupants of the apartment, and seizing evidence in plain view.[14] This forcible entry into Mejias' residence, not validated by a warrant nor justified by exigent circumstances,

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[14] In addition to Mejias and appellant Padilla, co-defendants Salazar and Valenzuela were in the apartment.

violated the requirements of the Fourth Amendment and mandates reversal. Dorman v. United States, 435 F.2d 385, 390-391 (D.C. Cir. 1970) (en banc); United States v. Lindsay, 506 F.2d 166, 171 (D.C. Cir. 1974); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974) (rehearing denied); United States v. Shye, 492 F.2d 886, 893 (6th Cir. 1974); Vance v. State of North Carolina, 432 F.2d 984, 990-991 (4th Cir. 1970); cf. Coolidge v. New Hampshire, 403 U.S. 443, 480-481 (1971); see Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stanford L.Rev. 995 (1971); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 360 (1974).

The facts of this case squarely present the question of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975). While it is settled that a felony arrest in a public place based solely on probable cause, is generally valid, Watson v. United States, 423 U.S. 411, 417 (1976); Carroll v. United States, 267 U.S. 132, 156 (1925); United States v. Rollins, 522 F.2d 160, 167 (2d Cir. 1975), the question of whether a warrant is necessary to make an arrest in a home explicitly remains unresolved, in both this and the Supreme Court. Watson v. United States, supra, 423 U.S. at 418, n.6; Gerstein v. Pugh, supra, 420 U.S. at 113, n.13; Coolidge v. New Hampshire, supra, 403 U.S. at 480; Jones v. United States, 357 U.S. 493, 499-500 (1958);

United States v. Mapp, 476 F.2d 67, 74 (2d Cir. 1973);[15] see also United States v. Cognato, 408 F.Supp. 1000, 1003 (D.Conn. 1976).

The four Circuit Courts of Appeal which have considered the question -- the Fourth, Sixth, Ninth, and District of Columbia Circuits -- have all held that, absent exigent circumstances, a warrant is required for the purpose of entering a dwelling to arrest a suspect. Dorman v. United States, supra, 435 F.2d 385; United States v. Phillips, supra, 497 F.2d 1131; United States v. Shye, supra, 492 F.2d 886; Vance v. State of North Carolina, supra, 432 F.2d 984.

Dorman is characteristic. There, the court held that

> the constitutional safeguard that, with room for exceptions ["exigent circumstances" or "urgent need"] assures citizens the privacy and security of their homes unless a judicial official determines that it must be overriden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect.
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> Id., 435 F.2d at 390.

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[15] This Court's decision in United States v. Gonzalez, 483 F.2d 223, 224-225 (2d Cir. 1973), did not resolve the question, and that case is distinguishable. There, Customs agents entered a transient hotel room into which the defendant had just gone. Moreover, in Gonzalez, the record shows that exigent circumstances existed to justify the entry, since it was clear that the agents knew that any delay would have resulted in the destruction of incriminating evidence known to be in the defendant's possession at the time. Here, exigent circumstances for the entry did not exist, and the Government did not even attempt to justify the arrest on this basis.

See also United States v. Shye, supra, 492 F.2d at 893 ("warrantless entry of a dwelling for the purpose of arrest is per se unreasonable absent 'exigent circumstances'"); United States v. Phillips, supra, 497 F.2d at 1135 (accord); Vance v. State of North Carolina, supra, 432 F.2d at 990 ("an arrest inside a dwelling without a warrant, or pursuant to an invalid warrant, is per se unreasonable under the Fourth Amendment unless there are 'exigent circumstances' justifying the police in bypassing a magistrate").

Reference to the Fourth Amendment and the judicial authorities which apply it establish that these decisions are correct. The Amendment provides that:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Its basic purpose is to safeguard the privacy of an individual's home from arbitrary governmental invasion.[16] Berger v. New York, 388 U.S. 41, 53 (1967); Camara v. Municipal Court, 387 U.S. 523, 529 (1967); Jones v. United States, 357 U.S. 493, 498 (1958). Indeed, the Supreme Court has termed this

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[16] "Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." Dorman v. United States, supra, 435 F.2d at 389.

right "basic to a free society":

> The knock at the door, whether by day or by night ... without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.
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> Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

As the Court has made clear:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competetive enterprise of ferreting out crime.... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.
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> Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Thus, except for a few, well-delineated exceptions, searches conducted without prior approval of a judge or magistrate are, per se, violative of the Fourth Amendment. Katz v. United States, 389 U.S. 347, 357 (1967); see United States v. Mapp, supra, 476 F.2d at 76. This same rule also applies to an entry in a home to effect an arrest. Dorman v. United States, supra, 435 F.2d at 390-391; United States v. Phillips, supra, 497 F.2d at 1135; United States v. Shye, supra, 492

F.2d at 891. Since an arrest -- a seizure of the person -- in a home is the most extreme intrusion, it follows a fortiori that such a seizure must be made wit.. a warrant.

Moreover, the terms of the Fourth Amendment themselves do not differentiate between searches and arrests. Thus, whether persons or things are to be seized, a valid warrant requires a description of the place to be searched and the persons or things to be seized.

Not only is it undisputed that no warrant was obtained here, but it is clear that exigent circumstances did not exist. The investigation had been focused for months and had allowed the police more than ample time to secure a warrant. On the particular day in question, the decision to arrest had been made more than two hours prior to the actual entry into the apartment. While the superintendent of the building had expressed some resentment to the police, he cooperated with them, and there was no evidence that the superintendent was going to warn Mejias. In fact, other officers were stationed to prevent any possible escape. Indeed, the District Court found no indication of imminent flight, nor any evidence that Palazzotto believed co-defendant Mejias was armed (A.144-145). The crime charged was not one involving violence. United States v. Phillips, supra, 497 F.2d at 1135, n.2. Finally, the Government specifically disavowed reliance on the theory that the entry was justified by exigent circumstances (H.945).

The forcible, warrantless entry into Mejias' apartment

to arrest him was violative of the Fourth Amendment. The evidence gained as a result of that entry and the subsequent search of the apartment must be suppressed. Wong Sun v. United States, 371 U.S. 471, 488 (1963).[17]

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[17]As the result of pretrial hearings on the issue, the District Court found that appellant Padilla had standing to assert the Fourth Amendment claim (H.60). There can be no dispute that this finding was correct.

## Point III

THE ADMISSION INTO EVIDENCE OF DOCUMENTS SEIZED FROM APPELLANT PADILLA ON FEBRUARY 19, 1976, WAS ERROR, AND REQUIRES REVERSAL.

During the course of the trial, the Government offered into evidence three pieces of paper seized from appellant Padilla. These documents were a hotel receipt, a receipt for the purchase of a piece of luggage, and a business card with typewritten notations on the back. Defense counsel objected that this proof was hearsay, and consequently inadmissible, unless it was within an exception to the otherwise applicable rule excluding it.[18] Rule 802, Federal Rules of Evidence; 5 Wigmore, EVIDENCE, §1364 et seq. (Chadbourn rev. 1974). Judge Carter allowed them into evidence on the ground that they were discovered in appellant Padilla's possession (T.3411-3412). However, he did not give any limiting instruction precluding use of the documents as proof of their contents. This ruling was clearly incorrect, and because of the prejudice to appellant Padilla, requires reversal.

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[18] Rule 802 of the Federal Rules of Evidence, the federal "hearsay rule," provides:

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

The relevant exception that would permit admission of the documents was the one for business records. The business records exception, now codified in Rule 803(6) of the Federal Rules of Evidence,[19] requires the testimony of a qualified witness that the documents in question were kept in the regular course of business; that it was the regular practice of the business to make the records; and that the documents were made contemporaneously with the events recorded. Rule 803(6); see United States v. Rosenstein, 474 F.2d 705, 710 (2d Cir. 1973); United States v. Maddox, 444 F.2d 148, 150 (2d Cir. 1971).

> If the witness cannot vouch that the requirements of Rule 803(6) have been met, the entry must be excluded.
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> Weinstein, FEDERAL RULES OF EVIDENCE, ¶803(6)[01] at 803-142-43.

None of these requirements was met in this case, and the necessary testimonial foundation was simply ignored. Thus,

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[19] Thus, Rule 803(6) provides that the following documents are admissible:

> [a] memorandum, report, record ... of acts, events ..., made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report ... all as shown by the testimony of the custodian or other qualified witness.
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> Emphasis added.

the District Court's decision allowing the evidence resulted in a failure to comply with longstanding principles of the rules of evidence.[20]

The record is clear that the documents in question were used to prove the truth of the matter asserted in them. Indeed, the Government justified their admissibility on precisely this ground. Thus, the Assistant United States Attorney argued to the District Judge that the luggage receipt showed that appellant Padilla purchased and owned the particular piece of luggage reflected on the sales slip, while the hotel receipt proved that appellant Padilla was, in fact, the occupant of Room 327 at the Skyline Motor Inn. Similarly, it was argued that the notations on the Las Americas business card reflected an itinerary for appellant Padilla's travels to Colombia (T.3396-3397). The use of this evidence to prove the truth of their contents without the required testimony to establish it as an exception to the hearsay rule is a substantial error. Rule 802, Federal Rules of Evidence; 5 Wigmore, EVIDENCE, §1364 et seq. (Chadbourn rev. 1974).

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[20] The testimonial foundation necessary for the admissibility of business records is a traditional requirement. See former 28 U.S.C. §1732; 5 Wigmore, EVIDENCE, §1517 et seq. (Chadbourn rev. 1974).

These documents were critical to establishing appellant Padilla's connection to the conspiracy. Thus, the hotel receipt connected appellant Padilla to the conspiracy at the crucial time period from the end of August to the beginning of September 1974, and to the hotel room in which was found the attache case containing large sums of money. Moreover, it served to corroborate the Government's contention of a close relationship between appellant Padilla and another co-conspirator. Likewise, the luggage sales slip was proof of appellant's ownership of the attache case, while it was the Government's theory that the notations on the business card reflected a trip taken in April 1974 as part of the conspiracy (T.3395-3398).

Thus, these documents provided the only evidence corroborative of the Government's theory that appellant Padilla's mere presence with co-conspirators, prior to his arrest, showed guilty knowledge of and a stake in the crime charged. Without them, the Government's contention that appellant was a lo gtime participant in the conspiracy would have been severely jeopardized, since the surveillance testimony involving appellant Padilla, without more, was insufficient. United States v. Johnson, 513 F.2d 819, 823-824 (2d Cir. 1975); United States v. Cirillo, 499 F.2d 872, 885 (2d Cir. 1974); United States v. Terrell, 474 F.2d 878 (2d Cir. 1973); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir. 1959).

In fact, during summation, the Assistant United States

Attorney emphasized the importance of these documents. Thus, he argued that the business card showed that, as part of the conspiracy, appellant Padilla took a trip to Colombia during April 1974 (T.3629), that he stayed with co-conspirator Cedena at the Skyline Motor Inn from August 26-September 2, 1974 (T.3730), and that the receipt for the luggage reflected the sale to appellant Padilla of the attache case found in Room 327 (T.3731).[21] After this portion of the summation, the District Judge, in the jurors' presence, told the Assistant United States Attorney that:

> I think that those documents were admitted in evidence and were admitted only for the purpose of showing that they were in his [appellant Padilla's] possession at the time of his arrest and you may ask the jury to conjecture, but they were not admitted for the purpose that you indicated, Mr. Carey.

However, this colloquy, directed to counsel for the Government, was clearly insufficient to alert the jurors that the evidence was inadmissible and could not be considered for any purpose.[22] Indeed, by his instruction, the District Judge told the jurors that, based on the documentary proof in question, they could properly conjecture about its significance.

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[21] On rebuttal, the Assistant United States Attorney again argued to the jurors the importance of the evidence seized from appellant Padilla on February 19, 1976 (T.3997-4000).

[22] The Assistant United States Attorney himself said, "I don't understand" (T.3731).

The documents in question were erroneously admitted in evidence. Because they were prejudicial, reversal of the conviction is required.

## Point IV

BECAUSE THE DELAY IN THIS CASE VIOLATED THE SOUTHERN DISTRICT PLAN FOR THE PROMPT DISPOSITION OF CRIMINAL CASES, REVERSAL OF APPELLANT PADILLA'S CONVICTION AND DISMISSAL OF THE INDICTMENT ARE REQUIRED.

Rule 4 of the then-applicable Southern District Plan for Achieving Prompt Disposition of Criminal Cases provided that:

> [i]n all cases the government must be ready for trial within six months from the date of the arrest....

In this case, as the result of an intensive Federal-State investigation involving narcotics activities, appellant Padilla was arrested on September 3, 1974. Shortly thereafter, the Federal Government agreed that Padilla would be prosecuted only by officials of the State of New York. Thus, pursuant to this understanding, he remained in State custody for approximately 17 months. The indictment here, based on the previous arrest, was returned on February 10, 1976, and the Government's notice of readiness for trial was not filed until May 4, 1976, 20 months after the arrest. This long delay between arrest and the Government's readiness for trial requires reversal of the judgment and remand to the District Court with a direction to dismiss the indictment with prejudice.

For speedy trial purposes, the time began to run from the date of the first arrest in which federal agents participated and which was predicated on the preceding joint investigation.

United States v. Cabral, 475 F.2d 715, 717-718 (1st Cir. 1973); see also United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972), cert. denied, 410 U.S. 911 (1973).

Just as "a search is a search by a federal official if he had a hand in it," Lustig v. United States, 338 U.S. 74, 78 (1949); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), so too an arrest is federal if the participation of federal agents makes it a joint venture. Here, it is clear that the arrest, as well as the prior investigation, was a common Federal-State enterprise, and that the delay involved should have been measured from September 3, 1974.

Absent any excludable periods, the time continues to run until a notice of readiness is filed on the charge based on this arrest. United States v. Flores, 501 F.2d 1356, 1359 (2d Cir. 1974); United States v. Furey, 500 F.2d 338, 343-344 (2d Cir. 1974); United States v. Rollins, 487 F.2d 409, 411 (2d Cir. 1973); Rules 4 and 5 of the Southern District Plan.

Here, no tolling period provided in Rule 5 was applicable. While the period of time when evidence material to the Government's case is unavailable is excluded, "the prosecuting attorney ... [must] exercise due diligence to obtain such evidence." Rule 5(c)(i). Moreover, the record reflects that the federal prosecutors **did not even** attempt to obtain the evidence they knew the State officers possessed until one year after the arrest (Record on Appeal, Document #25, at 3-6).

Nor is the justification offered for excluding the delay

-- deference to State authorities -- allowed by any other exception of Rule 5. The only other possible exception, that for "exceptional circumstances" (Rule 5(h)), is not applicable either. Rule 5(h) "was intended to cover extraordinary occasions that the drafters could not envision," United States v. Rollins, 475 F.2d 1108, 1110 (2d Cir. 1973). To the contrary, Federal-State cooperation is a common practice, and deference to State authorities not unusual. Since this is so, the apparent justification for the delay in this case cannot be considered within the coverage of Rule 5(h). Consequently, the Government was not ready for trial within the required period of time, violating Rule 4's six-month limit. Dismissal of the indictment is thus required.

## Point V

INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED IN THIS BRIEF, APPELLANT PADILLA ADOPTS THE ARGUMENTS RAISED ON BEHALF OF HIS CO-APPELLANTS.

## CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the indictment dismissed; alternatively, the case must be remanded for resentence before a different District Judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Nov 11, 1976

I certify that a copy of this brief has been mailed to the United States Attorney for the Southern District of New York.

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